IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1847

MARK W. GERACI

and

JOSEPH A. GERACI,

Petitioners,

vs.

ST. XAVIER HIGH SCHOOL,
REV. PAUL BORGMANN,
MICHAEL D. TRAINOR,
THOMAS A. MEYER,
REV. ROBERT O'CONNER,
RICHARD B. BERNING,
RICHARD J. PIENING,
JAMES F. CAHILL,
REV. DANIEL L. FLAHERTY,

and

SOCIETY OF JESUS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Ohio

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

The Respondents have referred in their Brief to the pie-throwing incident as a "most serious breach of discipline and a traumatic experience for the teacher and for St. Xavier High School" as justification for the severe and unjust action which it took against Mark Geraci.

The fact that Mark's expulsion has so little support in the St. Xavier community is evidenced by the fact that not a single teacher, student, or parent, except Mr. Downie

testified for St. Xavier High School. As a matter of fact, Mr. Downie testified that he accepted Mark's apology, liked Mark, had no animosity towards him, was never consulted about the penalty, and had naught to do with Mark's expulsion. Mark, in turn, thought very highly of Mr. Downie, gave him as his first reference for college, and evaluated him as good or excellent in various categories as a teacher and as a person in the official evaluation which students make of their teachers. It was admitted by all that there was no malice involved in the throwing of the pie.

Also, the summary expulsion of Mark from St. Xavier High School by Mr. Meyer and its confirmation by Mr. Trainor, the Principal and Father Borgmann, the President, did not meet "fundamentally fair procedure" or show "a genuine human concern for Mark and his father", as stated by the Respondents. The expulsion did not follow the submission of the case to the Disciplinary Board, there were no procedures set up for a hearing before Mr. Meyer, nor for an appeal to Mr. Trainor and Father Borgmann. Every fundamental right of Mark's was violated. He was summoned to a meeting by Mr. Meyer, the Assistant Principal in the evening after school hours, without being told that he was charged with an offense, was never told that he was subject to expulsion, was never advised as to what specific disciplinary rule he had violated, that he could refuse to answer questions, was entitled to confer with counsel, or even with his parents. He was denied the basic rights to which even the worst criminal is entitled under law. Instead, a seventeen year old boy was confronted alone by an admittedly agitated school administrator who had been ordered by his superior to punish him with the most severe penalty he could inflict. In so doing, he proceeded without contacting

Mark's parents, whose presence he testified was advisable because he "would like to hear from them too as to what they think about it", and "because they are more mature people than the son".

Father Borgmann also testified:

> "I like to have parents present when a young man is expelled."

Moreover, Mr. Meyer was hasty and he did not wait until the excitement had died down, and calmness and reason prevailed. His lack of appreciation for the terrible harm and injury he had done Mark and of the severity of the penalty is evident from his testimony:

> "Q. But you knew that expulsion would cause an awful lot of injury to Mark Geraci, didn't you know that sir?
>
> A. I didn't necessarily know that."

The contacts between the Geracis and Mr. Trainor and Father Borgmann were on an informal basis and had no official sanction in the Handbook, or the Rules and Regulations of St. Xavier High School. They resulted because the Geracis insisted on seeing them. No witnesses were presented and the meetings were in the nature of conversations between the parties. The Geracis were told that the administrators were not interested in hearing from the six other boys involved in the conspiracy, their minds had been made up and they were not going to change them.

ARGUMENT

I. THE PETITION HAS NOT BEEN RENDERED MOOT BY THE GRADUATION OF MARK GERACI FROM ANOTHER PRIVATE, PAROCHIAL HIGH SCHOOL.

Petitioners Seek Post-Graduation Relief.

This case is not moot. The news story from the Cincinnati Enquirer of June 12, 1979 attached to Respondents' Brief as Appendix A adds nothing to this case. Admittedly, Geraci's reinstatement to St. Xavier High School is moot. He has graduated from another high school, and further attendance at St. Xavier High School is out of the question.

However, if Mark was unlawfully expelled, there is no doubt that the Petitioners have pending causes of action against the Respondents which they asserted in their Complaint which are viable and not moot.

In addition to expungement of the student's record of an invalid expulsion imposed without a due process hearing, the student is also entitled to monetary damages for injuries sustained even when there is no pecuniary loss, *Piphus* v. *People United to Save Humanity,* 545 F. (2d) 30. Likewise, his father has a similar cause of action, both of which survive even after Mark's graduation.

Unlike the factual situation in *Board of School Commissioners of the City of Indianapolis* v. *Jacobs,* 420 U.S. 128, the Petitioners presented substantial proof of personal injuries sustained as a result of Mark's expulsion. Mark testified that he sustained emotional injury which "damaged me as far as my ideas of justice and what it was all about. I didn't think I was treated fairly . . . A

lot of times I couldn't sleep after I found out. I had a lot of sleepless nights, and since then developed stomach problems that I had to go to the doctor for pills . . ."

Joseph A. Geraci, the father, testified that he suffered mental anguish, lost twelve pounds, and aggravation of a previous back condition, nerves and that "I am still most upset and was physically and mentally whipped with the situation".

In addition, the Petitioners pointed out to the Supreme Court of Ohio in their brief:

> ". . . even if he graduates from another school this case would not be moot since a real viable controversy would still be pending before the Courts."

The devastating and damaging effect of an improper or arbitrary suspension or expulsion of a student from school is well documented by this Court in *Goss* v. *Lopez,* 419 U.S. 565, 574.

II. THE CONSTITUTIONAL RIGHT OF DUE PROCESS SET FORTH IN THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION APPLIES TO AND IS CONTROLLING IN DISCIPLINARY PROCEEDINGS BY A PRIVATE SCHOOL AGAINST A STUDENT.

Private Education Performs A "Public Function" And Involves The State.

The denial of the doctrine of "public or governmental function" invoking the Fourteenth Amendment asserted by the Petitioners has been limited largely to cases involving activities of a business nature carried on for profit. The operation of a public utility or a club where liquor is dispensed under a state license can hardly be equated with educational activities declared mandatory by the state. The differences between such cases, the regulation of parochial schools by the state, and the importance of such regulation for the advancement of good citizenship was pointed out by this Court in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534, wherein the Court stated:

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and *patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.*" (Emphasis Ours)

The language in *Evans* v. *Newton,* 382 U.S. 296, and *Jackson* v. *Metropolitan Edison Company,* 419 U.S. 345,

is obiter dictum, and as previously pointed out, not binding or determinative of the issues in this case.

Jackson deals with an entirely different situation, namely whether a private utility organized for profit is engaged in "state action" so that a customer whose service was discontinued for non-payment is entitled to notice and other "due process". This Court held that such activity of the utility is private and not governmental, and we heartily agree.

This Court has never decided the issue before it as to whether private or parochial schools carrying on educational activities sanctioned by the State in the mandatory education of primary and secondary school children are governed by the due process provision of the Fourteenth Amendment.

This was recently recognized by this Court in *Flagg Bros., Inc.* v. *Brooks,* 436 U.S. 149, cited by the Respondents. While denying that a warehouseman selling property stored by it in accordance with the New York Statutes in order to perfect its lien for non-payment of storage fees was engaged in "state action" within the Fourteenth Amendment, it made it very clear that this decision had very limited application. This Court stated:

> "And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution'. *Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.* The mere

recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them." (Emphasis Ours)

In this regard, Ohio has recognized the public nature of the performance of the duties of a private policeman commissioned by public authority, holding the private employer who paid such policeman not liable for the acts of such private policeman because he is presumed to be acting in his official capacity as a policeman, *New York, Chicago and St. Louis Railroad Co.* v. *Fieback,* 87 Oh. St. 254, 100 N.E. 889; *Erie Railroad Co.* v. *Johnson,* 106 F. (2d) 550 (C.C.A. 6).

Due Process Is Required In Determination Of The Penalty.

Moreover, while at all times Mark Geraci denied his guilt, he nevertheless was entitled to a due process hearing. Due process to which a person is entitled is as applicable to the proceedings for the imposition of the penalty as it is to the proceedings for the determination of guilt. The Respondents are therefore in error in their claim that since Mark Geraci was guilty of the offense he was not entitled to a due process hearing on the matter of the penalty.

Lockett v. *State of Ohio,* 98 Sup. Ct. Rep. 2984, is ample authority that the Constitution requires due process and fairness in the consideration of the penalty after a person has been found guilty.

In addition, the imposition of a penalty not based on standards, but strictly based on whim or caprice is unconstitutional, *Furman* v. *Georgia,* 408 U.S. 238.

Mandatory penalties are likewise unconstitutional in capital cases, *Woodson* v. *North Carolina,* 428 U.S. 280.

Similarly, a student who unequivocably admits his guilt and who faces expulsion is entitled to a due process hearing. *Keller* v. *Fochs,* 385 F. Supp. 262 (E.D. Wisc.)

More Formality In Proceedings Is Required In Expulsion Cases.

Also, in *Vought* v. *VanBuren,* 306 F. Supp. 1138 (E.D. Mich.), the fact that a public school student and his parents were advised by the principal that he was expelled from school and later given the opportunity to contest the expulsion before the Board of Education did not constitute due process and such action violated his constitutional rights. Similarly to this case, the Court found the student was entitled to a substantial hearing before the expulsion as pointed out in *Vought* on P. 1363:

> "It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma. It would seem that in taking an action of such drastic nature the Board of Education would have been interested in providing plaintiff with the opportunity to offer his explantion of the circumstances prior to the actual expulsion action by the Board. The position defendants seemed to take was an adamant one – plaintiff was guilty of violating the school policy as contained in the memorandum which had been read to him and he knew expulsion could result. Therefore, say defendants, nothing more was owed Plaintiff by defendants. Plaintiff claims he was entitled to a hearing. Defendants say he got one. Defendants refer to the Board meeting when Plaintiff appeared with his parents and his attorney. This was subsequent to the expulsion. Plaintiff has been presented with a fait accompli at this point."

There can be no minimizing the gravity and the tremendous harm which results from expulsion. In this regard, *Sullivan* v. *Houston Independent School District,* 333 F. Supp. 1149, 1172 (S.D. Tex.), pungently observed:

> " . . . suspension is a particularly humiliating punishment evoking images of the public penitent of medieval Christendom and colonial Massachusetts, the outlaw of the American West, and the ostracized citizen of Classical Athens. Suspension is an officially-sanctioned judgment that a student be for some period removed beyond the pale."

Judge James Doyle in *Soglin* v. *Kauffman,* 295 F. Supp. 978, 988, (W.D. Wis.) recognized the severe punitive effect of a school expulsion in the following language:

> "I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding."

Goss v. *Lopez,* 419 U.S. 565 is authority for:

(1) Notice and a hearing are required in public school disciplinary proceedings.

(2) Longer suspensions require more formal procedure.

This is evident from P. 581 of the Opinion:

> "We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency."

Also, on P. 584 of *Goss* the following appears:

> "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."

Board of Curators of the University of Missouri v. *Horwitz,* 435 U.S. 78, cited by the Respondents on P. 14 of their Brief is not in point except that this Court has very emphatically drawn the distinction that due process must be granted in disciplinary proceedings, and not in cases of dismissal for academic reasons. Further, the medical student dismissed for academic reasons had had several warnings, had been placed on probation, was aware that her work was being closely monitored, and was allowed an adequate appeal to the Provost of the University. The proceedings were not summary as in this case.

Power Of Expulsion By Private Schools Is Sanctioned By Ohio Statute.

Moose Lodge No. 107 v. *Irvis,* 407 U.S. 163, cited by the Respondents on P. 11 of their brief is not authority for the Respondents' position, but to the contrary supports Petitioners' claim. In *Moose Lodge,* a liquor license to a private club issued by the State of Pennsylvania made the actions of the Lodge in discriminating against blacks in membership as required by its Constitution and By-Laws unconstitutional under the Fourteenth Amendment. The regulation of the Pennsylvania Liquor Control Board which required "every club licensee to adhere to all of the provisions of its Constitution and By-Laws" placed the force and weight of the State of Pennsylvania behind the discriminatory policy of the private club and constituted state action.

Similarly, *3321.04(C) O.R.C.* (Page 32 (a) Petitioners' Original Brief) authorizing Mark's expulsion, to use the language found on P. 178 of *Moose Lodge* "would be to place state sanctions" behind Mark's expulsion.

Grounds Of Expulsion Are Unconstitutional Because Of Vagueness And Generality.

It should also be pointed out that the Respondents have not answered in their Brief the argument of the Petitioners that they were denied due process because the expulsion of Mark Geraci was based on Grounds 2 and 8 of the St. Xavier Handbook, which has been appended to the Petitioner's Petition as Appendix R, which were vague and not specific. There was no valid charge ever asserted against Mark, and all proceedings must be deemed void.

Justice Thomas Clark is in accord in *Nitzburg* v. *Parks*, 525 F. (2d) 378 (C.C.A. 4) wherein he found a regulation of the Board of Education permitting the distribution of literature by students on school property "as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption or material interference with school activities" to be unconstitutional. Justice Clark stated on P. 383 that this regulation, which carried with it the penalty of suspension, did not detail criteria or set forth standards, and thus:

> "On its face, therefore, the Board's regulations are void for vagueness and overbreadth."

Also overlooked in Respondents' Brief is the fact that Judge Bettman of the Ohio Court of Appeals in his Opinion intimated that *R.C. 3321.04(C)* did sanction St. Xavier High School's decision to expel Mark Geraci, but disagreed with Petitioners that this made Mark's expulsion "state action." Judge Bettman's language is as follows:

> "To the extent that appellant may be correct in asserting that a private school's decision to suspend or expel a student is sanctioned by *R.C. 3321.04(C)*,

> this still does not involve the state in the decision-making process."

Petitioners disagree and contend that if the power to expel a student in a private or parochial school is sanctioned by the state, the state does become involved in the decision-making process to the extent that such power under Ohio law must be used reasonably and not abused by a private school, *Schoppelrei* v. *Franklin University*, 11 Oh. App. (2d) 62.

Also, it should be borne in mind that *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534, does not authorize completely independent private or parochial schools, but mandates that such schools are subject to reasonable regulation and must carry out the purpose of the state and not be "inimical to the public welfare." Such "public welfare" requires that the interests of the State not be defeated by injury to a student which causes him to question the values of a democratic society. This was pointed out in *58 Marquette Law Review, 705, 739*:

> "The recent court intervention into school discipline should not be seen by school administration as a direct attack on their authority to manage and control the educational process. It instead should serve as the impetus for schools to transform the traditional concepts of due process into a classroom demonstration of how a democratic society functions.
>
> Students have a peculiar need for receiving fair treatment. In a time when the 'system' is being challenged on all fronts, students are looking for evidence that they live in a fair society in which rules, not the arbitrary action of men, governs. If their first contact with the 'system' results in feelings of unfairness and bitterness the damage done may be irreparable."

Respondents incorrectly have drawn the conclusion on P. 14 of their Brief that Petitioners have admitted that Respondents' action does not involve a constitutional question because of the reference to P. 24 of Petitioners' Brief. If anything less than expulsion had been chosen, because of the extreme expense involved in this litigation, it is likely that for practical reasons this case would not have been brought. Thus, it is not only the procedural defect, but the severity of the punishment which is under attack. Even the Trial Court on P. 9 of its Opinion characterized the expulsion as "drastic punishment."

CONCLUSION

It should be evident that Mark and his father have been greatly injured by Mark's expulsion. It also should be evident that the school administrators had acted in a manner which was unreasonable, punitive, and while they were agitated. It is also clear that they had not considered Mark's unblemished record in the matter of discipline, as well as the fact that he was the outstanding student of his class, because they had concluded that nothing he could say or do would mitigate the penalty of expulsion. They failed to notify his parents, even though they admitted that their presence was advisable and the usual procedure. The grounds for Mark's expulsion were vague and did not meet constitutional standards.

Also, the Administrators admittedly pre-judged the case which renders all proceedings void, *Tumey* v. *Ohio,* 273 U.S. 510.

The public function of education was eloquently stated in *Brown* v. *Board of Education,* 347 U.S. 483:

> "Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . "

In every respect Mark was denied rights. Moreover, due process requires "fundamentally fair procedures" as pointed out by this Court in *Goss* v. *Lopez,* 419 U.S. 565, 574. This Court has recognized the rights of juveniles in criminal cases, *In Re Gault,* 387 U.S. 1. Civil law generally gives a minor more, and not less, protection than it accords an adult, which was entirely lacking in this case.

Education at the primary and secondary levels in private or parochial schools in a state which makes education to the age of eighteen mandatory is a public function, and such private or parochial schools are engaged in activities which are subject to the Constitution of the United States.

There is no First Amendment issue involved in this case. The Respondents have never raised it, perhaps because the philosophy on "due process" applicable in matters relating to the Catholic religion in the Cincinnati Archdiocese has found expression in the distribution by it of literature which states.

> "The protection of human rights and freedoms has become a matter of concern to all members of the Church. The dignity of the human person, the principles of fundamental fairness and the universally applicable presumption of freedom require that no member of the Church arbitrarily be deprived of the exercise of any right or office. Rights without legal safeguards both preventive and by way of effective recourse, are often meaningless. Procedural protections are known as "due process" whereby the rights of all persons in the Church may be adequately safeguarded. It is the

> noblest service of the Church to afford effective safeguards for the protection of rights, and, where rights have been violated, to afford effective means for their prompt restoration. . . "

Consequently, Mark and his father had a right to assume that in its disciplinary proceedings St. Xavier High School would act in accordance with the basic Catholic concepts of due process and the spirit of forgiveness. They certainly define the relationship between the parties and constitute a part of the contract for Mark's enrollment and continued education which the respondents have denied him.

Petitioners do not seek to "have this Court consign a century of Constitutional interpretation and doctrine to the scrapyard of history". The issue presented to this Court has never been decided by it. Petitioners seek only to apply the reasoning and analogy of *Marsh* v. *Alabama,* 326 U.S. 501, which this Court has consistently cited with approval in subsequent cases as authority that private activity which performs a public and governmental function represents "state action." They particularly refer to the almost identical public nature of the functions performed by private education and a company-owned town, and the applicable reasoning of Justice Frankfurter on P. 510 of his concurring Opinion in *Marsh*:

> "But a company-owned town is still a town in its community aspects. It does not differ from other towns."

This Court has reserved the determination of the issue raised in this case as to whether private or parochial schools are subject to the Fourteenth Amendment of the United States Constitution. This issue has wide interest and applicability.

Petitioners submit that their Petition should be granted.

Respectfully submitted,

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